No. 95-393

Supreme Court, U.S.
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IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1995

DAVID HELLER,

Petitioner,

v.

SYLVIA SMITH BOWMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari when, given that the "statement" at issue was inadequately linked to respondent's involvement in a union election, the case was correctly decided?
2. Should this Court grant certiorari when the courts below correctly considered the context of the statement to determine the applicable scope of First Amendment protection?
3. Should this Court grant certiorari to decide which of the multi-pronged tests courts should follow to determine public figure status under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) when the tests all look to the same core factors and the distinctions amongst the tests are insubstantial?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

1. Respondent, Sylvia Smith Bowman, joined the Department of Public Welfare as a social worker in 1967. As a consequence of the events at issue, she left the Department with workers' compensation in August 1991. (A.45; R.379.)[1] Petitioner, David Heller, was a social worker in the same

[1] Numbers preceded by "Pet." refer to the Petition for a Writ of Certiorari, dated September 8, 1995; those preceded by "A." or "Ad." refer to the appendix and the addendum attached thereto, respectively; numbers preceded by "R." refer to the Record Transcript, dated April 5-17, 1993; numbers preceded by "B." refer to the appendix attached to the Opposition to the Petition for a Writ of Certiorari, dated November 10, 1995.

office as respondent. For several years prior to the incident which gave rise to this litigation, Heller was antagonistic toward Bowman. Bowman testified that Heller threatened her on one occasion, stating that if she testified regarding another co-worker, "[she'd] be sorry." (R.627.) Heller himself testified to his motivation for spite: he had heard that Bowman had called him a communist (R.978), and she had told him that she "hated his politics." (R.976.)[2]

In October 1987, Heller's hostility led him to contrive a scheme to degrade and humiliate Bowman. Throughout her 20 year career, Bowman had been active in Local 509 of the Service Employees International Union ("Union"). (A.48-49; R.383-384, 650-652.) In 1987, Bowman decided to campaign for the Union presidency. (A.46, 49; R.385-386.) Taking advantage of the availability of Bowman's photograph in her campaign materials, Heller prepared two photocopies consisting of a composite of photographs of naked and partially naked female bodies in sexually explicit poses on which he superimposed cut-outs of Bowman's face and name. (A.46; R.1072-1073, 1159-1162; B.1-2) One photocopy depicted Bowman completely naked in a masturbatory position and the other depicted her legs spread apart to expose her genitals. (A.46; R.1337-1338; B.1-2) Heller then distributed copies of these photocopies to five carefully selected colleagues. (R.1076-1080.) Although Heller asked the distributees not to show or circulate the photocopies to anyone else, and testified that he "never" thought Bowman would see the photocopies, (R.1079-1080), the Worcester Office of the Department of Public Welfare was quickly infested with reproductions of Heller's creations. (A.52.) Bowman was soon bombarded with comments relating to the photocopies.

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[2] Petitioner makes much of allegations that respondent used sexual epithets in the workplace, without identifying any possible relevance of these alleged statements to the merits of respondent's claims. Significantly, the trial court made no finding on this issue.

Her supervisor told her that he had seen them and that they "excited him" and "gave [her] a wonderful body." (R.392.) Other colleagues made similar statements, remarking on her "fine body" and the attention she would receive from the photocopies. (R.392-393.)

It is clear from the record that Heller prepared and distributed the photocopies motivated solely by ill-will and animosity toward Bowman, and not for any higher political purpose. Heller testified that he did not intend "to have an effect on the overall election" (R.1178), he did not intend to induce people not to vote for Bowman (R.1178), and he did not "intend to degrade Bowman as a candidate." (R.1122.) Rather, the photocopies were meant to be a "private joke" (R.1196) to be shared with five employees who appreciated Heller's "off-color humor" (R.1078-1079) and who had already "made up their minds" with respect to the upcoming election. (R.1178.) He further testified that he took pains to ensure that the photocopies would go no further, and that he "never thought [Bowman] would see [them] in a million years." (R.1079.) Yet, raising the First Amendment issue at trial, Heller attempted to transform his crude personal attack upon a co-worker into enlightened political discourse. Although he testified that he intended to make Bowman "look [as] ridiculous" as he felt her ideas were (R.1168), he was unable to articulate how the images he crafted of Bowman reflected anything about her political positions or integrity as a candidate. (R.1167-1168.)

When Bowman saw the photocopies, she was so shocked that she could not clearly recall the events of the next few hours. (A.54; R.400-401.)[3] The photocopies made her feel

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[3] Petitioner suggests that the acute emotional distress Bowman suffered was feigned because the photocopies were similar to other pictures that frequently circulated through the office. (Pet.8.) The record is clear

(continued...)

"fearful," "vulnerable" and "degraded." (A.81.) The trial court found the photocopies "intimidating" and that they "reduced [Bowman] to nothing more than a naked woman, spread-eagled and exposed." (A.87; R.39.) Bowman's treating psychologist testified that the photocopies caused Bowman to suffer from Post-Traumatic Stress Disorder, which includes symptoms of fearfulness, flashbacks, difficulty with memory and concentration, uncontrollable crying and loss of trust. (A.57-58; R.494-495.) This testimony went uncontradicted.

2. Bowman filed suit in the Suffolk County Superior Court, alleging a variety of claims based upon Heller's preparation and distribution of the photocopies, including claims for intentional and reckless infliction of emotional distress, defamation and violations of the Massachusetts Civil Rights Act. Judge Flannery ruled that Bowman had proven all the elements of intentional infliction of emotional distress under Massachusetts law and that Heller had violated Bowman's statutory right to be free of sexual harassment,[4] and awarded Bowman $35,000 in damages.

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[3](...continued)
that the Bowman photocopies differed markedly from all other previously circulated photocopies in their focus on an identifiable co-worker from the same office and their sexually-explicit content. (A.52, 63; R.26, 235, 266-267, 1147-1148, 1185-1186.) Moreover, given the practice in the Department of circulating "humorous" material (A.51-52; R.235, 267), the trial court concluded that Heller had to be aware that Bowman was substantially certain to see the photocopies. (A.51-52.)

[4] Although the trial court found ample evidence to conclude that Heller's conduct "clearly created an 'intimidating, hostile, humiliating or sexually offensive work environment,'" (A.82) (citations omitted), the Supreme Judicial Court of Massachusetts summarily disposed of Bowman's claim that Heller's actions violated her right to be free from sexual harassment under the Massachusetts Civil Rights Act (Mass. Gen. L. ch. 12 § 11I (1995)). (A.6 n.4.)

In addressing the First Amendment issue, the trial court held that although Bowman was a limited purpose public figure as a result of her candidacy in the Union election, the photocopies fell outside the scope of First Amendment protection because: (1) they were devoid of an articulable message and thereby differed from the political satire protected by this Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and (2) "First Amendment concerns are subject to various restrictions in the workplace where employees may be a captive audience." (A.70.) The trial court's well-reasoned opinion was grounded in a fact-specific determination of both the context of the alleged speech and its utter lack of content.

3. Heller appealed, and the Supreme Judicial Court of Massachusetts took jurisdiction of the matter *sua sponte*. The Supreme Judicial Court affirmed the trial court's determination that Heller's photocopies were not entitled to First Amendment protection under *Hustler Magazine*, stating that an individual's status as a public figure is "context-dependent" (A.13) and that the particular union election at issue was not a public controversy sufficient to give Bowman public figure status.

Because it concluded that there was no public controversy, the court found that it "need not decide if the defendant's cartoons were germane to the plaintiff's participation in the [U]nion election." (A.16 n.8.) However, as the trial court found (A.68-69), and as discussed *supra*, there is ample evidence to demonstrate that the cartoons were not germane, thus underscoring the correctness of the result below.

REASONS FOR DENYING THE WRIT

BASED ON THE PARTICULAR FACTS OF THE CASE, THE FINDING THAT BOWMAN IS NOT A LIMITED PUBLIC FIGURE IS NOT CONTRARY TO THIS COURT'S HOLDING IN *GERTZ V. ROBERT WELCH, INC.*, 418 U.S. 323 (1974).

A. Respondent Is Not A Limited Public Figure With Respect To The "Speech" At Issue Because There Is No Nexus Between That Speech And The Issue With Respect To Which Petitioner Claims She Was A Public Figure.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court first elaborated the distinction between limited and all-purpose public figures. This Court there held that the actual malice standard developed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is to be employed in defamation actions brought by all-purpose public figures, those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," *Gertz*, 418 U.S. at 345, and in actions brought by limited public figures, those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.*

In keeping with the underlying philosophy of *Gertz*, lower courts, with virtual unanimity, have held that before the actual malice standard can be applied against a limited public figure, the defendant must demonstrate that the statement at issue was "adequately linked" to the matter with respect to which the plaintiff entered the public limelight. *Clyburn v. News World Communications, Inc.*, 903 F.2d 29, 32 (D.C. Cir. 1990). *Accord Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (statement must be "germane to the plaintiff's participation in the controversy"); *Roffman v. Trump*, 754 F. Supp. 411, 417

(E.D. Pa. 1990) (statement must "relate to the public issue in which the plaintiff became involved").[5] Petitioner has utterly failed to demonstrate that the "speech" in question — the photo-collages of respondent's head affixed to sexually explicit naked and partially naked female bodies — bore any connection to the Union election. Although the court did not rely upon the lack of nexus between the photocopies and respondent's public figure status, respondent is entitled "to defend [the] judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even

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[5] Petitioner's suggestion that state and federal courts use diverse criteria in applying the *Gertz* standard, and therefore this Court should grant the writ, is misguided. Merely dividing an analysis into a different number of factors is not an indication of diverse criteria. In fact, the courts themselves have acknowledged that the varying applications of the *Gertz* test are consistent in spite of the fact that different courts use a differing number of steps. *See, e.g., Naantaanbuu v. Abernathy*, 816 F. Supp. 218, 224 (S.D.N.Y. 1993). Clearly, the fact that courts articulate tests differently does not necessitate diverse outcomes. Each court employing the *Gertz* test looks to the same core factors: whether the target entered the public sphere and whether the statement at issue relates to the public side of the plaintiff's life. There are many circumstances in which courts use different tests to reach substantially the same results. *See, e.g., Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1030 (6th Cir. 1995) (four-prong test for determining whether to issue a preliminary injunction); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1453 (7th Cir. 1995) (two-prong initial test, followed by a balancing test); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (two-prong test); *cf. Versa Prods. Co. v. Bifold Co.*, 50 F.3d 189, 199, 202 (3d Cir. 1995) (ten-factor test to determine likelihood of confusion); *Universal Money Ctrs., Inc. v. AT&T*, 22 F.3d 1527, 1530 (10th Cir.), *cert. denied*, 115 S. Ct. 655 (1994) (four-factor test); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (eight-factor test). These formulaic distinctions are not the types of splits among the courts that the writ of certiorari was designed to remedy.

considered." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979).[6]

As the extensive record demonstrates, and the trial court found, petitioner's "private joke" (R.1196) had nothing to do with the election. Petitioner acknowledged that he did not intend to "have an effect on the overall election" (R.1178), did not intend to induce people not to vote for respondent (R.1177-1178) and did not intend to "degrade Bowman as a candidate." (R.1122.) In fact, Heller only distributed the photocopies to five co-employees who had already "made up their minds." (R.1178.) He never meant to influence the overall election: indeed he averred that he took pains to keep his handiwork out of the marketplace of ideas. (R.1079, 1178-1179.) In light of the personal antagonism petitioner felt for Bowman (R.627, 976, 978), any political purpose contrived by petitioner's counsel is a transparent afterthought.

The absence of any nexus to Bowman's limited public status is critical to the instant case. Unlike the respondent in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988),[7] Bowman

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[6] Given that the result in this case is the correct one, and that the writ is to be granted "only for compelling reasons" (Sup. Ct. R. 10), any inconsistency between the rulings of this and other courts and the Supreme Judicial Court of Massachusetts' determination that this plaintiff, on these facts, was not a public figure, does not make this case worthy of certiorari.

[7] Throughout his argument, petitioner tries to pique this Court's interest by claiming that respondent has attempted to cloak herself in the garb of "political correctness," and that the only difference between respondent and Jerry Falwell is one of gender. This is a faulty assertion; the facts here and those in *Hustler* are readily distinguished. *Hustler* involves a "nationally known" public figure; this case does not. *Hustler* involves a widespread dissemination in a public arena; this case involves dissemination in the target's workplace. And finally, *Hustler* involves speech relevant to the target's position and reputation; this case does not.

is not an all-purpose public figure whose name is a "household word." *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987). If Bowman is to be labeled a public figure at all, she may be so identified only for the very specific purpose of the Local 509 Union election of 1987.[8] Heller's photocopies, depicting Bowman's head superimposed over naked bodies in sexual poses, are simply not "adequately linked" to the election. *Clyburn*, 903 F.2d at 32. The figure of a naked woman does not send a message about one's integrity as a candidate. *See Phyfer v. Fiona Press*, 12 Med. L. Rptr. 2211 (N.D. Miss. 1986) (photograph of naked woman, identified as plaintiff, found to have no relation to plaintiff's status as elected official or political candidate); *cf. Naantaanbuu v. Abernathy*, 816 F. Supp. 218 (S.D.N.Y. 1993) (allegations of romantic involvement with Dr. Martin Luther King, Jr., are outside the scope of limited public figure status created by running for political office). Without having put her personal, sexual mores at issue, respondent cannot be a limited purpose public figure with regard to petitioner's creation. *See Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-38 (2d Cir. 1984), *cert. denied*, 421 U.S. 1054 (1985) (plaintiff, having injected herself into societal debate over sex and nudity, found to be a limited public figure for that purpose and photograph of a naked woman, identified as plaintiff, found to be relevant to that debate).

We do not deny that a "candidate who vaunts h[er] spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent . . . attempts to demonstrate the contrary," but this is simply not the setting of the present case. *Monitor*

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[8] Thus, petitioner's likening of respondent to President Kennedy, Jesse Jackson, Richard Nixon, Bill Clinton, Hillary Rodham Clinton, and others is preposterous. (Pet.22; Ad.1-9.) Those individuals are all-purpose public figures, and as such all aspects of their lives are exposed to scrutiny.

Patriot Co. v. Roy, 401 U.S. 265, 274 (1971), *quoted in Hustler v. Falwell*, 485 U.S. 46, 51-52 (1988). Petitioner has never asserted either that the "speech" in question was in retaliation for the manner in which Bowman portrayed herself as a candidate or that the "speech" was intended as an assault on Bowman's integrity as a candidate. Heller's "private joke," at the expense of an elderly woman whom he disliked, was to be shared only with a select few who shared his "off-color humor." (R.1075-1080.) In fact, he explicitly told those colleagues to whom he gave the photocopies not to show or circulate them. (R.1079-1080.) It is clear under these covert circumstances that the photocopies were not intended to be — and never were — the political satire which petitioner now contends. Heller wanted to make Bowman "look ridiculous" irrespective of the Union election. The trial court, which heard the testimony and was best able to evaluate Heller's credibility and intent, concluded that "no articulable political statement [could] be gleaned from the photocopies of Bowman." (A.68.)

Even in those cases petitioner cites to support his contention that candidates for union elections are per se public figures, the courts have engaged in this type of factual analysis. In *Materia v. Huff*, 394 Mass. 328 (1985), the "facts essential" in determining whether the target was a public figure were agreed by the parties to be the following:

> [The target] had been secretary-treasurer of Local 526 for fifteen years and was seeking another term in office when the alleged defamation occurred. The letter in dispute, signed by . . . the opposing slate in the election campaign, *attacked the [target's] past performance as a union official.*

Id. at 330 (emphasis added).

Similarly, most of the other cases relied upon by petitioner make clear that the targets were public figures because the speech involved the targets' status and their *special duties as union officials*. *See Miller v. Transamerican Press*, 621 F.2d 721 (1980), *cert. denied*, 450 U.S. 1041 (1981); *Lins v. Evening News Assoc.*, 129 Mich. App. 419 (Ct. App. 1983); *City Firefighters Union Local 28 v. Duci*, 104 Misc. 2d 498 (Sup. Ct. N.Y. Co. 1976); *see also Miles v. Perry*, 11 Conn. App. 584, 592 n.7 (App. Ct. 1987) ("[u]nion officers are generally held to be public figures for purposes of union business"). In the remaining cases either the parties agreed to the "public figure" label, the court never reached the question of whether the target was a public figure, or the speech involved was clearly related to the limited purpose for which the target was deemed to be a public figure.

The determination of the nexus between speech and an individual's public involvement is, by its very nature, a fact-specific inquiry. Reasonable triers of fact will therefore differ in their resolutions of this query. Accordingly, even if this Court were to determine that petitioner's speech bore a sufficient relation to respondent's public involvement, the import of this holding would be necessarily limited to the case at bar and would not constitute "compelling reasons" justifying this Court's grant of certiorari. Sup. Ct. R. 10.

B. The Context Of The Statement At Issue, Made To A Captive Audience In Contravention Of Established State Interests, Weighs In Favor Of Lesser First Amendment Protection.

This Court has long recognized that the particular context of speech will determine the appropriate scope of First Amendment protection. As Justice White stated, "[t]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Soc'y for Krishna*

Consciousness, Inc., 452 U.S. 640, 647 (1981) (holding fairgrounds context to be relevant to proper scope of First Amendment protection). In many other contexts this Court has declared that countervailing governmental interests necessitate a lesser scope of First Amendment protection. *See, e.g., Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994) (plurality opinion), 1891 (Souter, J., concurring) (public employment);[9] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (public schools); *Greer v. Spock*, 424 U.S. 828 (1976) (military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city rapid transit cars); *Adderley v. Florida*, 385 U.S. 39 (1966) (jails).

One context this Court has repeatedly determined warrants a diminished scope of First Amendment protection is the "captive audience." The special interests of the listener who is not free to leave must be considered in determining the appropriate scope of First Amendment liberty. *See Frisby v. Schultz*, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech"); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980) (government can prohibit speech as intrusive if "the 'captive' audience cannot avoid objectionable speech"); *Lehman*, 418 U.S. at 302 (audience is captive if it is "there as a matter of necessity, not of choice").

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[9] In *Waters*, the plurality opinion stated that, the First Amendment notwithstanding, it may be appropriate for a government employer such as the one in this case to prohibit its employees from using rude or offensive language in the workplace. The plurality concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Id.* at 1888.

As the late Chief Justice Warren recognized, "[e]mployees during working hours are the classic captive audience." *NLRB v. United Steelworkers*, 357 U.S. 357, 368 (1958) (Warren, C.J., dissenting in part and concurring in part); *accord Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("'Few audiences are more captive than the average worker'") (quoting Balkin, "Some Realism About Pluralism: Legal Realist Approaches to the First Amendment," 1990 Duke L. J. 375, 423-24), *cross appeals dismissed per stipulation* (March 14, 1995); *Commonwealth v. A Juvenile*, 368 Mass. 580, 583 (1975)[10] ("store employees were involuntarily present" during offensive speech and "could not be expected to abandon their" positions). In keeping with the above authority, the trial court stated that "First Amendment concerns are subject to various restrictions in the workplace where employees may be a captive audience." (A.70.) *See also* Suzanne Sangree, "Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight," 47 *Rutgers L. Rev.* 461 (1995) (arguing that employees are the prototypical captive audience).

There can be little doubt that Bowman, as a full-time employee of the Department of Public Welfare, was held captive to Heller's attacking speech — speech that generated an increasingly hostile environment for Bowman. Short of leaving her job of twenty years, Bowman simply had no way of avoiding the objectionable speech and its consequences.[11]

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[10] The statute examined in *A Juvenile*, Mass. Gen. L. ch. 272 § 53 (1973), was amended in 1983, thereby superseding the principal holding. However, the statutory amendment in no way alters the principle for which respondent cites to this case.

[11] Any suggestion that Bowman was not a captive audience because she could have chosen not to view the photocopies is absurd. Her workplace was infested; the photocopies had become the talk of the

(continued...)

It is indisputable that Massachusetts has a valid interest in protecting employees from the type of speech petitioner uttered in the instant case. States have a long-recognized interest in keeping the workplace free from discriminatory and harassing speech, an interest which necessarily limits the degree of First Amendment protection to be provided such speech.[12] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (noting that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices"). This Court and others have been particularly sensitive to abuses in the workplace, *see*, *e.g.*, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993) (finding Title VII violation when the workplace is "permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'"); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989), *cert. denied*, 115 S. Ct. 1110 (1995) (holding that symbolic references to lynching could be restricted in the workplace), and courts have not hesitated to uphold restrictions on speech when that speech creates a hostile work environment. *See Robinson*, 760 F. Supp. at 1535 ("[Pornographic] pictures and verbal harassment are not

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[11](...continued)
office. (A.81.) Indeed, Bowman was subjected to comments from both her supervisor and her colleagues about her new "wonderful," "fine" and "excit[ing]" body. (R.392-393.)

[12] This Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). Speech that is "vulgar," "offensive" and "shocking" is "not entitled to absolute constitutional protection under all circumstances." *FCC v. Pacifica Foundation*, 438 U.S. 726, 747, *reh'g denied*, 439 U.S. 883 (1978). Heller's crude photocopies, if speech at all, should be considered low-value speech meriting lesser constitutional protection.

protected speech because they act as discriminatory conduct in the form of a hostile work environment."); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (compelling interest in eliminating gender discrimination in the workplace may justify First Amendment restrictions). There can be little doubt that the photocopies, which reduced Bowman in front of her supervisors and colleagues to "nothing more than a naked woman, spread-eagled and exposed" (R.39) created a hostile environment in which Bowman was required to work.

Enforcing a civil judgment for intentionally tortious conduct is an appropriate means for the state to demonstrate its substantial interest in protecting workers from sexual harassment. While it is true that Bowman's claims under the Massachusetts Civil Rights Act were dismissed on appeal,[13] the state interest in maintaining a workplace environment free of discrimination derives its roots not merely from specified statutory prohibitions, but from common law concerns of equity, fairness and equality. *See Foster v. Albertsons, Inc.*, 254 Mont. 117, 126 (1992) ("Montana has recognized a common law cause of action for retaliatory discharge related to sexual harassment"); *Kerans v. Porter Paint Co.*, 61 Ohio St. 3d 486 (1991) (creating common law remedy for sexual harassment); *Collins v. Rizkana*, 73 Ohio St. 3d 65 (1995) (adopting common law tort of wrongful discharge in violation

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[13] The Commonwealth of Massachusetts conditions a judgment under its Civil Rights Act on a finding of threats, intimidation, or coercion. It was because of this added requirement, which is not necessary to establish sexual harassment under the law prohibiting employment discrimination in Massachusetts, Mass. Gen. L. ch. 151B § 1.18 (1995) or under federal law, Title VII, 42 U.S.C. § 2000a (1995), *et seq.*, that the Supreme Judicial Court vacated the trial court's judgment under the Massachusetts Civil Rights Act. Because Bowman did not raise a claim under these more specific laws prohibiting sexual harassment, the lower courts were not required to determine whether their statutory requirements were met here.

of public policy based on workplace sexual harassment. Court held that statutory prohibitions against sexual harassment do not preclude adoption of common law tort given strong public policy at issue); *Dias v. Sky Chefs, Inc.*, 1989 U.S. Dist. Lexis 497 *18 (D. Or. 1989), *aff'd*, 919 F.2d 1370 (9th Cir. 1990), *vacated on other grounds*, 501 U.S. 1201, *aff'd*, 948 F.2d 532 (9th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992) (holding common law action for wrongful discharge based upon protestation of sexual harassment not preempted by pertinent statutory prohibitions). Massachusetts chose to protect its employee from that hostile work environment by, *inter alia*, permitting claims under the tort of intentional infliction of emotional distress.

As the trial court properly concluded, when "speech" is directed at a captive audience in contravention of established state interests, that context is relevant to, though not dispositive of, the First Amendment analysis. In the instant case, where the "speech" is simply not germane to respondent's status as a limited public figure and where the context calls for a diminished level of First Amendment protection, the Massachusetts' courts were correct in refusing to require a showing of actual malice.

Petitioner's final contention, that the court below engaged in viewpoint discrimination, because its ruling was "premised upon findings of fact that 'establishe[d] an "approved" view of women'" (Pet.33), is baseless. Neither of the courts below devised a standard as to what would be an acceptable portrait of a woman. The Supreme Judicial Court of Massachusetts never addressed the substance of the photocopies. (A.16 n.8.) To the extent the trial court considered the content of the images, it was for the entirely appropriate determination of whether there was a nexus between the images and the purpose for which Bowman may have been a public figure. (A.70.) Petitioner's fallacious argument that viewpoint discrimination occurred below is simply another transparent

attempt to portray this correctly decided, fact-specific case as worthy of this Court's review.[14]

CONCLUSION

Heller's *post hoc* attempt to convert his crude photocopies of Bowman into some sort of political satire makes a mockery of one of this country's most treasured principles, that the free exchange of ideas is constitutionally protected. The record demonstrates, and the trial court so found, that Heller's purpose in preparing the images was not to sway votes or influence the election but rather to ridicule and demean a female co-worker he disliked. This "speech" bore no relation to Bowman's possible status as a limited purpose public figure. There is no constitutional shield for mounting a personal attack against a co-employee. *Briggs v. Village of Dupo*, 892 F.2d 1298, 1302 (7th Cir. 1990) ("First Amendment does not protect public employees' ordinary personnel disputes").

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[14] A further example of petitioner's attempt to muddy the waters is his invocation of *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 115 S. Ct. 2338, 2345 (1995). *Hurley* concerned a parade — a gathering together of people to express themselves as a group with a common purpose — which in and of itself is an expression protected by the First Amendment. In that context, this Court correctly found that a "narrow, succinctly articulable message is not a condition of constitutional protection" when referring to parade participants. However, in the present case, a nexus must exist between the speech and the limited purpose for which a person is a public figure. *See, e.g., Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1295 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). A search for a message is thus appropriate. Here again, as is the case throughout the petition for certiorari, petitioner conflates the analysis for all-purpose public figures with that for limited public figures.

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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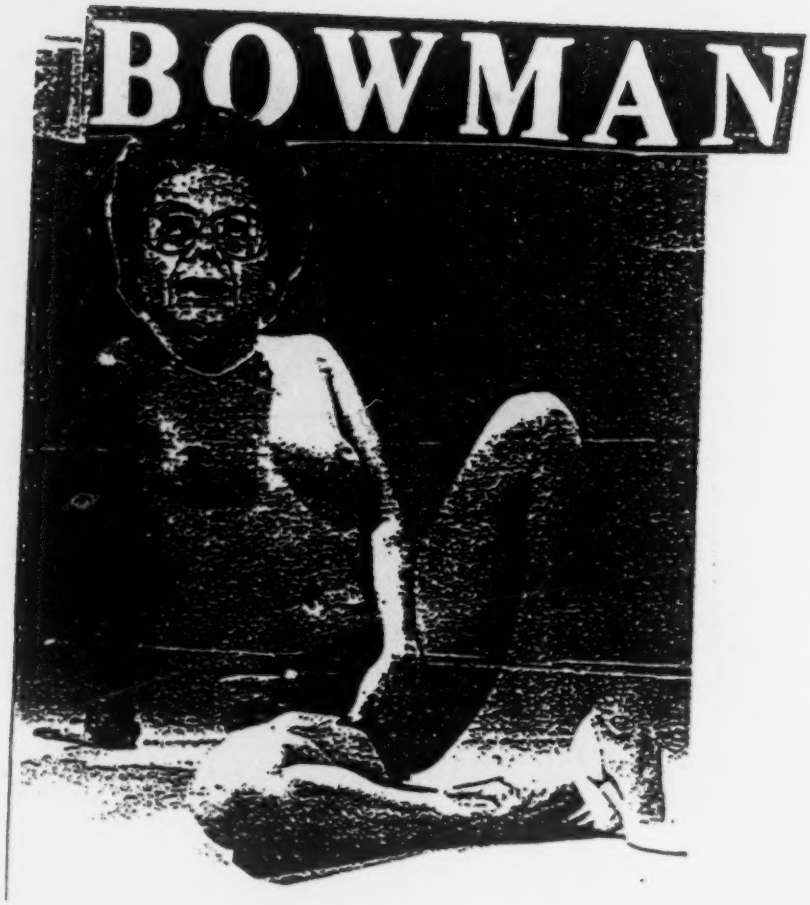
APPENDIX


BOWMAN

BOWMAN